

No. 76-1827

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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ALAN HAIM, PETITIONER

v.

UNITED STATES OF AMERICA

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The court of appeals issued no opinion.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 1) was entered on May 24, 1977. The petition for a writ of certiorari was filed on June 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the district court acted within its discretion in revoking petitioner's probation.

**STATEMENT**

Following his guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of two counts of using the mails to distribute

obscene material in violation of 18 U.S.C. 1461.<sup>1</sup> He was sentenced to five years' imprisonment and a \$1,844.83 fine (Tr. 18).

The court suspended execution of the sentence of imprisonment and placed petitioner on five years' probation with the special condition that he "not engage, directly or indirectly in any business connected in any way with the distribution of obscene or pornographic material" (Tr. 19).<sup>2</sup> Subsequently, the United States Probation Officer for the Western District of Louisiana filed a motion to revoke petitioner's probation on the ground that petitioner had violated the special condition of his probation by mailing an obscene magazine and movie from Los Angeles, California, to Springfield, Illinois (Pet. 7).

The evidence at the revocation hearing showed that a resident of Springfield, Illinois, received an unsolicited advertisement for sexually oriented materials, which he forwarded to a United States postal inspector who authorized a test purchase of the material (Tr. 28-30). The purchase included a reel of movie film entitled "Big Dick II," and a magazine entitled "Stokers," both of which were introduced into evidence and viewed by the court (Tr. 34-36, 40). A postal clerk identified petitioner from a photograph as one of the individuals who had delivered

<sup>1</sup>Prior to his guilty plea petitioner sought to transfer the proceedings to the Central District of California. His motion was denied. The court of appeals subsequently denied petitioner's motion for a writ of mandamus and this Court denied his motion for leave to file a petition for a writ of mandamus and/or prohibition *sub nom. Novick v. United States District Court for the Western District of Louisiana*, 423 U.S. 911.

<sup>2</sup>"Tr." refers to the one-volume transcript of petitioner's plea, sentencing, and probation revocation proceedings.

the materials to the post office for mailing (Tr. 37-38).<sup>3</sup> The envelope in which the materials were mailed was addressed by petitioner and bore two of his fingerprints (Tr. 46-47). At the conclusion of the hearing the court found the materials to be

obscene in Louisiana where we are trying the probation revocation and that's all that is required. \* \* \* Whether or not California or Illinois would, as a community standard, regard this as obscene is of no moment in a hearing of this kind. In the mind of this Court, it is obscene and pornographic [Tr. 51-52, 53].

Accordingly, the court revoked petitioner's probation and ordered him to serve the five years' imprisonment originally imposed on the first count, to be followed by five years' probation on the second count (Tr. 53-54). The court of appeals affirmed (Pet. App. I).

#### ARGUMENT

Petitioner contends that the sentencing court could not properly hold that he had violated his probation by distributing obscene materials unless it found that the materials he distributed were obscene under the standard of the community from which the materials were mailed (California) or in which they were received (Illinois). This contention is insubstantial. Since petitioner's original conviction was based on the community standard of Louisiana, that standard equally applied when the question of revocation of probation was involved.

Petitioner's special condition of probation precluded him from distributing in any community materials considered

<sup>3</sup>These materials (Gx 4, 5 and 6) depicted nude men and women engaged in coition, fellation and cunnilingus. The exhibits and transcript have been lodged with the Clerk.



obscene by Louisiana standards.<sup>4</sup> The limited possibility that the hard core pornography involved here might not have been found obscene in another community was irrelevant as long as it was obscene in the locale in which petitioner was convicted and in which he was placed on probation.

This condition of probation was within the power of the court. A sentencing court has broad discretion in fixing the conditions of probation. *Burns v. United States*, 287 U.S. 216, 220-221. The prohibited conduct need not be a crime. See e.g. *Malone v. United States*, 502 F. 2d 554 (C.A. 9), certiorari denied, 419 U.S. 1124; *United States v. Kohlberg*, 472 F. 2d 1189 (C.A. 9).<sup>5</sup> The sentencing court need only insure—as was the case here—that the condition of probation is reasonably and necessarily related to the treatment of the accused and the protection of the public. *United States v. Pastore*, 537 F. 2d 675 (C.A. 2); *Malone v. United States*, *supra*, 502 F. 2d at 556; *Porth v. Templar*, 453 F. 2d 330 (C.A. 10); See *Birzon v. King*, 469 F. 2d 1241, 1243 (C.A. 2).

<sup>4</sup>The sentencing court's language shows that it intended to prevent petitioner from distributing any materials of the kind involved here (Tr. 19). The court reaffirmed this intention at the revocation hearing when it stated (Tr. 53):

We gave him a chance by giving him a suspended sentence and he clearly understood he was not engage [sic] in this sort of thing anywhere in the United States. We knew he was going back to California. He was not to engage in this activity anywhere in the United States.

<sup>5</sup>In some cases defendants have been required to give up legitimate businesses or professions for the period of probation. E.g., *Whaley v. United States*, 324 F. 2d 356, 359 (C.A. 9), certiorari denied, 376 U.S. 911 (defendant who impersonated FBI agent prohibited from continuing repossession business); *Stone v. United States*, 153 F. 2d 331, 332-333 (C.A. 9) (railroad stewards who defrauded employer prohibited from returning to that employment).

Since petitioner was originally convicted of distributing obscene materials in Louisiana, the prohibition of further distribution imposed in light of the standards of that state was related to petitioner's rehabilitation and the public order. Accordingly, when the evidence introduced at the revocation hearing reasonably satisfied the court that petitioner had distributed materials considered obscene by Louisiana standards, that court could properly find that petitioner's conduct had violated the special condition of probation and revoke that probation.<sup>6</sup> See *United States v. Francischine*, 512 F. 2d 827, 829 (C.A. 5), certiorari denied, 423 U.S. 931.

#### CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1977.

<sup>6</sup>Petitioner does not contend that the evidence introduced at the revocation hearing was insufficient to allow the sentencing court to find that the material he distributed was obscene under Louisiana obscenity standards.